

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Case No. 1:19-cv-02934-CRC

JOINT STATUS REPORT

Pursuant to the Court’s October 25, 2019 opinion and order, Plaintiff American Oversight and Defendant United States Department of State (“State”) hereby submit this Joint Status Report in this Freedom of Information Act (“FOIA”) case. *See* ECF No. 15.

I. Status of Plaintiff’s FOIA Request and Future Searches

On November 22, 2019, State produced 98 pages of records, which State represents completed its production with respect to the priority documents described in the parties’ prior Joint Status Report. *See* ECF No. 16. Plaintiff has requested that State search and prioritize two categories of records for production by December 20, 2019. Specifically, American Oversight has requested that State produce (1) any more informal records reflecting the content of the president’s July 25, 2019 call with the president of Ukraine (e.g. handwritten notes, emails reflecting the content of the call, or prep or briefing materials prepared in advance of the call) where only summaries and readouts were subject to the Court’s initial order, and (2) responsive records reflecting communications between the prioritized custodians agreed to in the prior Joint Status Report and Ambassadors Gordon Sondland and Kurt Volker. American Oversight also raised questions about State’s search, including the search cut-off date employed. American

Oversight requested that an updated production also be included if a cut-off date before October 1, 2019 was employed. The parties have been unable to come to agreement.

II. Defendant's Position

State has agreed to Plaintiff's request to make its next production of responsive documents on December 20, 2019. State proposes to process 300 pages of potentially responsive records subject to FOIA prior to that production, in accordance with its standard practice in FOIA cases. In addition, in response to Plaintiff's questions about State's search, State will provide Plaintiff with a draft search declaration on December 9, 2019, which will describe the parameters of the search State conducted in response to Plaintiff's priority request. Plaintiff has asked for certain information about State's search in advance of the December 9 date, but State generally does not provide information that will be provided in a search declaration until all information about the search has been compiled, reviewed, and cleared through the appropriate internal channels. That said, State is confident that it has conducted its searches in accordance with FOIA's requirements.

Because of its other FOIA burdens and limits on processing capacity, State cannot commit to prioritizing the categories of records requested by Plaintiff, nor can State agree to expand the scope of Plaintiff's requests. If Plaintiff successfully amends its complaint, State will process this case in accordance with the amended complaint and the requirements of FOIA, but cannot voluntarily expand the scope of the only requests currently at issue. State's proposal to process 300 pages of potentially responsive records by December 20, 2019 will already require substantial resources, as State has less than a month to process records before the agreed-upon production date, and given the holidays, many of State's employees responsible for processing Plaintiff's FOIA requests will be unavailable for part of the remaining time. State's resources

are further strained by its other FOIA burdens, including the eight FOIA cases on similar matters within this district, *see infra* Part IV, and two other FOIA cases on similar matters in other districts, *see N.Y. Times Co. v. U.S. Dep't of State*, 19-cv-9420 (S.D.N.Y.); *Protect Democracy Project v. U.S. Dep't of State*, 19-cv-12115 (D. Mass.). Moreover, now that State has completed its production of Plaintiff's priority request, the remaining records in this case are more likely to be internal to the State Department, and therefore are likely to require more time to review for redactions compared to the documents targeted for the priority production. Moreover, State's agreement to produce a draft search declaration by December 9 will also require substantial resources. It normally takes State a month or six weeks to produce a draft search declaration, but State is committing to complete the draft declaration in this case within two weeks.

III. Plaintiff's Position

a. Prioritized Categories for Production

Plaintiff American Oversight has requested that State prioritize two additional categories of records of the greatest public importance to be produced in its next production, on December 20, 2019. State has proposed only to process records at its standard rate of processing of 300 pages per month without any prioritization even though it has acknowledged that these requests merit expedited processing as they seek records that concern matters of urgent public concern.

First, American Oversight requests that State be ordered to produce, by December 20, 2019, all records reflecting communications (including emails, text messages, and calendar entries) between the narrowed list of officials the parties agreed would be searched in their last Joint Status Report and only *two* State officials who are central to the House of Representatives' ongoing impeachment inquiry: Ambassador Gordon Sondland and Ambassador Kurt Volker.

Ambassadors Sondland and Volker were key witnesses in Congress's impeachment inquiry hearings, and records reflecting their communications with Secretary Pompeo and other high-ranking State Department officials about Mr. Giuliani's efforts to contact Ukrainian government officials, Ambassador Yovanovitch, or any effort to encourage Ukraine to investigate the president's political opponent are of paramount public importance. Only heightening the importance of these records, Ambassador Sondland testified that he had not been permitted to access many of his State Department emails and other records, and he stated that the inability to review those documents impacted his ability to accurately recall the events in question.

Transcript: Sondland's Nov. 20 Public Testimony in Front of the House Intelligence Committee, Wash. Post (Nov. 20, 2019, 5:05 PM),

<https://www.washingtonpost.com/politics/2019/11/20/transcript-sondlands-nov-public-testimony-front-house-intelligence-committee/> ("I have not had access to all of my phone

records, State Department e-mails and many, many other State Department documents. . . .

Having access to the State Department materials would have been very helpful to me in trying to reconstruct with whom I spoke and met, and when and what was said. . . . I've been hampered to provide completely accurate testimony without the benefit of those documents."'). Searching for and processing records reflecting communications with only these two State officials on this subject matter would not be unduly burdensome.

Although some portions of these records may properly be subject to claim of exemption, the volume of records should not be extraordinarily large, as they relate to communications with only two individuals. And even the segregable information contained in otherwise exempt communications (such as dates, times, and participants involved in those communications, among other things) could well prove useful for refreshing the participants' recollection about

even redacted content. Moreover, aspects of these communications that have now been officially acknowledged by current State officials in testimony will be subject to disclosure, and substantial factual information in these records—such as, for example, reports in email of meetings with Mr. Giuliani or mere awareness of news reports that investigations into Burisma would be related to the president’s political opponent—would be segregable and subject to production.

Second, American Oversight requests that State be ordered to produce, by December 20, 2019, more informal records reflecting the content of the president’s July 25, 2019 call with the president of Ukraine (e.g. handwritten notes, emails reflecting the content of the call, or prep or briefing materials prepared in advance of the call). The Court’s previous order required State to produce any non-exempt portions of readouts or summaries of that call. Op. & Order, ECF No. 17. American Oversight, in an effort to reduce the search and processing burden on State in its initial production, did not request that more informal records reflecting the content of that call be produced in State’s November 22, 2019 priority production. *See* Joint Status Report at 4 n.5, Oct. 31, 2019, ECF No. 16. Notwithstanding State’s ordinary practices of distributing read-outs of calls, State apparently did not locate any responsive readouts or summaries in the custody of or created by Secretary Pompeo, assistants communicating on his behalf, or Counselor Brechbuhl in its first search, despite reports that they were on the call. Much of the content of the president’s call has been officially acknowledged, and corroborating content contained in these few custodians’ possession would be of significant public importance and would not impose undue burdens on State to process.

State offers no reason for declining to prioritize the remaining records encompassed by Plaintiff’s FOIA requests in the order requested by Plaintiff (an order that, in Plaintiff’s estimation, prioritizes information of greatest public importance). Nor has State offered an

estimate of the volume of records encompassed within Plaintiff's two requested categories of records, as would be necessary to demonstrate any undue burden in agreeing to Plaintiff's proposed schedule. State's proposed approach – processing only 300 pages a month as self-selected by the agency – would not serve the public's urgent interest in understanding these important events, and Plaintiff requests the Court exercise its equitable authority under FOIA to promote these core public's interests.

In the alternative, American Oversight requests a status conference at the Court's earliest convenience to resolve the disputed matters related to the records to be produced in State's December 20, 2019 production.

b. Search Cut-Off Date

American Oversight has repeatedly requested that State identify the search cut-off date (the end of the date range for responsive records) that it has employed for its searched for responsive records, both prior to and after the November 22, 2019 production. State has refused to inform Plaintiff definitively of what search cut-off date or dates it has used and has made no meaningful attempt to justify its reticence on this point. There can be no doubt that State has this information available and could relay it to Plaintiff, but the agency has refused to do so until December 9, 2019. Employing an unreasonable cutoff date for the search, of course, effectively undercuts the intent of the Court's ordered production.

The records produced on November 22, 2019, provide strong indications that State used a search cut-off date well before it substantially began its search efforts, despite Plaintiff's request that documents be produced "through the date of the search." Compl. ¶¶ 9, 15. The information available to Plaintiff strongly suggests that State had not begun its searches in earnest until mid-October. *See* Transcript at 4, October 17, 2019, Teleconference (State's counsel representing that

State is “still crafting a search strategy.”); Transcript at 20, October 23, 2019, Motion Hearing (State’s counsel representing that it had done “all these searches since last week”). Yet, the most recent document contained in the November 22, 2019 production appears to be dated June 11, 2019, and State produced no record reflecting Rudy Giuliani’s reported September 2019 call with Secretary Pompeo,¹ even though State produced substantial documentation reflecting Mr. Giuliani’s March 2019 calls with the Secretary. American Oversight, consequently, does not believe that the search cut-off date or dates State has employed in this case—whatever they may be—meet the D.C. Circuit’s reasonableness standard. *See generally Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002).

However, to avoid unnecessary and burdensome briefing on the adequacy of State’s searches in this matter, and the concomitant delay, American Oversight intends to expeditiously move to amend its complaint in this action to add an additional FOIA request that is substantially similar to Plaintiff’s *Giuliani Communications FOIA*, Compl. ¶ 7, but which was submitted on September 24, 2019, and would therefore capture records at least up to that date—records American Oversight firmly believes should have been included in State’s first production given when material steps appear to have first undertaken to initiate the search. American Oversight regrets that this is necessary, but without having definitive knowledge of State’s search cut-off dates, it appears almost certain that vitally important records from time periods in which events crucial to Congress’s impeachment inquiry transpired will not be produced for the public to consider in weighing the merits of impeachment and removal of the president. Upon its

¹ See Greg Clary & Michael Warren, *Giuliani Says He Spoke to Pompeo Last Week About Ukraine Meeting*, CNN (Sept. 29, 2019, 4:37 PM), <https://www.cnn.com/2019/09/29/politics/rudy-giuliani-mike-pompeo-ukraine-meeting/index.html>.

amendment of the complaint, American Oversight respectfully requests that this Court order State to produce by December 20, 2019, any records covered by the Court's preliminary injunction for the time period between the search cutoff date(s) employed by State and the date of the search for records responsive to the September 24, 2019 FOIA request.

Plaintiff does not oppose State addressing its other questions about the search for responsive records in a December 9, 2019 draft declaration and reserves any other objections to the search parameters until that time.

IV. Other Litigation Concerning Ukraine-Related FOIA Requests to State

At the October 23 hearing, the Court inquired into the number of other FOIA cases in this district concerning Ukraine that had been filed against State. There are at least eight lawsuits against State in this district that relate to similar matters:

- a. *Ctr. For Investigative Reporting v. U.S. Dep't of State*, 19-cv-01726 (McFadden)
- b. *Solomon v. U.S. Dep't of State*, 19-cv-02019 (McFadden)
- c. *Citizens United v. U.S. Dep't of State*, 19-cv-2108 (Friedrich)
- d. *Judicial Watch v. U.S. Dep't of State*, 19-cv-02893 (McFadden)
- e. *Am. Oversight v. U.S. Dep't of State*, 19-cv-03058 (Cooper)
- f. *Judicial Watch v. U.S. Dep't of State*, 19-cv-02960 (Howell)
- g. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of State*, 19-cv-03488 (Hogan)
- h. *Am. Oversight v. U.S. Dep't of State*, 19-cv-03387 (Cooper)

V. Further Joint Status Reports

The parties will next submit a Joint Status Report on or before January 3, 2020, unless the Court orders otherwise.

Respectfully submitted,

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